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# AN INTERPRETATION OF THE PRINCIPLES OF PUBLIC LAW

IN the age of Louis XIV Corneille, Racine, and Molière used to criticize their own books, and the example is worth following. No one knows better than the author the purpose of his book, and none better, also, how that purpose is frustrated in the execution.

The first edition of my "Principles of Public Law" dates from 1910, the second from 1916; but the differences in both the plan and detail by which they are distinguished are not large enough to alter the general outline of the book.

The fundamental basis of public law is not contract nor the rule of law nor statute; it is not even directly the state. The real basis is the institution, and the state attains its real form only on becoming a corporate institution. This view I should defend somewhat as follows:

It has been my effort to construct a theory of the state different from the German theory of the Herrschaft, which is too subjective and anti-liberal in character. I yet desire to preserve the element of collateral power which in the jurisprudence of M. Duguit disappears too completely.[1] To attain this object my theory had to be not less juristic than political. It had to take account of the fact that the political organization of the state is bound up with the juridical organization of the nations in such fashion that the state

[1] On M. Hauriou's relation to the philosophy of M. Duguit, *cf.* his brochure, "Des Idées de M. Duguit," 1911. — EDS.

is not less a totality of legal situations than the governmental and administrative systems. In such perspective the fundamental problem is the relation between the state and law. The central point of dispute is to know if and how the state is submitted to law.

In England the solution of the problem is made easier by the fact that law is in large part customary in origin, is not, that is to say, derived from government. For that reason Professor Dicey has had some difficulty in basing the theory of the rule of law, at least in so far as it concerns the attempt to place the submission of a governmental process to customary law, on a sure foundation; but he has not expressly touched upon the question of the submission of Parliament to ancient written statute. In those countries where life is organized under the control of the written law, there is real difficulty in subordinating the governmental power which makes new written laws to the system of law represented by statutes of earlier origin. Practice has of course discovered the expedient of written constitutions. Ordinary law is subordinated to constitutional law; and ordinary law is annulled by the courts in case of conflict, but every mind eager for theoretical explanation must search to attach this expedient to some fundamental principle of jurisprudence.

In this situation German jurists have evoked the absolutist principle of the auto-limitation of the state; and similarly M. Duguit has postulated the *quasi-anarchic* principle of a rule of law in the formation of which the state has no part and which is imposed on the state in the same manner as on private citizens. It was to find a middle way between these two extremes that I have been led to the distinction between established law and new law, and thence to the notion of the institution. It is within the institution by the phenomenon of custom that new governmental law is transformed into an established law imposed upon government as a constitutional statute, but as a statute to the formation of which it has itself contributed. We thus obtain our fundamental equation. A constitution involves an institution, and an institution involves the submission of sovereignty to law by objective means.

The state is not the only corporate institution. We have incorporated municipalities, business, trade unions, etc. Briefly, there is a whole class of incorporated moral persons of which the

state is only a peculiarly interesting variety. The central theory of public law must then be the corporate institution with its internal constitution.

A corporate institution is a social organization on the road to personality. This raises the question of corporate personality which M. Duguit has tried in vain to eliminate.[2] It is essential because instinctive and anthropomorphic man finds the solution of the difficulties arising from the relations between social power and law by reproducing in social structure that personal structure which in his view aids in the distinction between justice and injustice. The inconveniences of the theory of corporate personality seem to arise from their having been envisaged under subjective and metaphysical aspects. I believe the same theory can be regarded objectively and organically and that it then presents a high value. Thence is derived the idea of personality, which means the organization of an objective individuality; that in its turn is the active appearance of the noumenon of the moral person. This assimilation of corporate personality and human personality supposes a postulate. It supposes that human individuality is organized in constitutional fashion, so that the constitutionalism of politics simply reproduces the constitutionalism in the human being without entering into a psychological discussion which would here be out of place. It is clear that this postulate is justified by the fact of liberty. Political liberty in the state is like the internal liberty of man, in that both are conditioned by organization and by structure, by the balance and adjustment of powers, are conditioned, in brief, by an objectively internal constitution.

In this way the idea of a corporate institution involves in itself the problem of a relation of political power to law and to personality; it is for this reason that it is taken as the pivot of theories of public law. Nor is this all. The institution serves admirably as a subject of historical study; it grows, it develops, it is organized and lives over the space of time. We are thus in the presence of a special phenomenon of the institution: it is the transformation of an organization of fact into an organization of law, of the real into the right. The question of the relationship of fact to law is one of the most difficult, as it is one of the most important. Immedi-

[2] For M. Duguit's views on this question, *cf.* his TRANSFORMATIONS DU DROIT PUBLIC, chap. I, and L'ÉTAT DE DROIT OBJECTIF, 242–55. — EDS.

ately the origin of law is historically considered its discussion becomes essential.

German jurisprudence solves it very simply. It equates law with force. A legal situation is a situation created by a power which has triumphed over resistance and made its will triumphant. There is no need to modify the situation by the action of any principle other than that of force. Force becomes law by success. Constituted law is an attack that has succeeded.

It is easier to protest against the cynicism of such an outlook than formally to refute it. At first sight history seems to prove it. In international conflict and political revolution brutal conquest has long been responsible for the forcible union of peoples, and insurrection has given rise to legitimate government. My theory of the institution makes possible a satisfactory explanation of the difficult problem of legitimacy arising from prescription. We have to analyze with exactness the events that have occurred. Around an organization of fact which the process of history has institutionalized and made legitimate we have in reality a succession of phenomena of which the apparent unity comes from their clustering round the single centre. In reality they are very different. In the first phase an organization is created simply by force, and it then desires to live in peace. But to obtain a peaceful existence the new organization must obtain pardon for its origin, must modify itself, must put itself in harmony with the conscience of jurisprudence. Peaceful existence is possible only when the demands of law are satisfied. Until that is achieved the usurper must maintain an armed peace, and an armed peace is not a peaceful existence. So any organization derived from force becomes neither institutionalized nor legitimate save when law has beatified it. Nor does law beatify by reason of force alone.

If we apply these principles to contemporary evidence it is clear that the armed peace imposed by Germany on France and on herself from 1870 to 1914, the clauses of the treaty of Frankfurt, and notably the forcible possession of Alsace-Lorraine, never became legalized by peaceful existence. It has always been a simple state of fact which the present war has brought rudely to an end.

The corporate institution thus occupies so central a position in public law that it is fundamental to inquire if it is not the social source of positive law. Let me explain. It has been customary for

a long time to catalogue the immediate sources of law as custom, statute, ordinance, and decree. But we are to find their relation to the social organization. The sources of written law, of statute or decree, are immediately perceived to belong to the organization of government. Custom escapes this category. It is certainly not governmental in origin; but because it is not governmental that does not mean that it is out of relationship with the structure of society. There are two theories as to the formation of custom. The opinion of the Roman and Canon lawyers derives it from the *usus communis* which has no relation with any social organization; the modern historical school supported by E. Lambert in his "Études droit Commun Legislatif" recognizes that it comes from the operation of a certain number of social institutions of non-governmental character — the practice of the officials of trade unions, of great business companies, the theories of courts. In reality we shall combine the two theories. From the initiative of a constituted body we get a precedent; common usage accepts it. The formation of custom has thus two parts. We have the initiative that originates a precedent, and is taken either by an institution or by a person to whom some institution has given social authority: without that authority the initiative will be fruitless. We have the acceptance of this initiative; the public accepts and repeats the precedent and it becomes obligatory. This clearly is the part played by common usage. Now while trade unions, business houses, and the rest are non-governmental institutions, they are nevertheless institutions of the state. The public which accepts the *usus communis* is itself an element of the state. As a result the formation of custom is related to the life of the state when the latter is regarded as a vast corporate institution containing within itself the centralized institutions. Every source of positive law may thus be brought back to the corporate institution and may perhaps emphasize in greater precision the bearing of this relationship. A corporate institution in general and the state in particular are here discussed only as sources of positive law. I have no concern at the moment with the relation of natural law to the law of the state. In itself, the state is only a formal organization for positive law. That is no reason why it should not search to approach the ideal by making its positive law conform to justice; but the idea of justice is not inherent in it. It is outside the state, as it is probably outside all social organization.

The state attempts approximation to it just as an individual tries in his personal conduct to approach the ideal of good. Natural law I propose to discuss in a later series of studies.

The positive law made by the corporate institution of the state is objective. It is not, that is to say, derived from the subjective will of the corporate state person, but results from the procedure followed by the functioning of those collective organizations which in their sum make up the objective individuality of the state. Here, again, it is clear that the definition I have given of personality has a real value.

These conceptions greatly help to solve the problem of the submission of the state of law. On the one hand, the necessity of submitting the mass of positive law to natural law is formally reserved. On the other hand, in order to facilitate the submission and because the ideal of justice has its influence upon the individual conscience living under a régime of liberty, every part of positive law is most favorably influenced towards liberty. We have in this sense what is called decentralization — the sources of law most directly derived from government are subordinated to those hardly derived from that source at all. So it is that ordinance and decree have to be subordinated to statute. The mechanism of statute is more decentralized because it meets with the phenomenon of the electorate. Thus, statute itself has in a certain measure to be submitted to the consolidating work performed by custom. Custom by its derivation from precedent, and from precedent made by autonomous institutions, as well as by the *usus communis*, is still more decentralized than the legislative apparatus. The ultimate guarantee is thus a statute confirmed by custom or *statutory custom*. Law is thus based on general custom.

So we come to the constitutional régime which marks the necessary reaction of custom on statute. Statutes, of course, we must have at the basis of everything, but custom is necessary to their making. In this aspect England, the parent of constitutional government, is right in making her constitution customary. Written and rigid constitutions are good experience for such countries as do not possess ancient general customs. But they can only fulfill their task when long usage has made them pliable and sacred.

So far I have done no more than analyze the first part of my book. The second, which deals with the régime of the state, is compara-

tively simple. It is, so to speak, a natural history of the state regarded as a special social formation peculiarly perfected and set over against more elementary formations.

The state may be defined as the political, economic, and legal centralization of a people, or, as sometimes occurs, of several peoples. It is not, that is to say, any society, but a society that has come to the historic stage of nationality, that has eclipsed earlier organizations. The proper form of the state is that of centralization; in a contrary sense, the fabric of the nation is reacted on by the forces of decentralization, and when under a democratic government a state is built on the basis of national sovereignty, we have the compromise of national decentralization balancing the centralization of the state.

The organization of the state has, as its concrete end, the establishment and protection of the civil life, political liberty being but the guarantee of civil liberty. That is to give to the life of the state the individualistic sense consecrated by tradition and to subordinate public law to private law. I may once more emphasize that I am not dealing here with natural law, but simply with the facts that observation discloses. I am simply pointing out the form of the state, what it may achieve and to what it is related. If the element of collectivism is introduced, if an attempt is made to overthrow the respective importance of public and private life so as to make public life prominent, the régime of the state does not evolve in a new direction, but is broken. What really results is to destroy the delicate equilibrium that has been attained. The effect of a leap in the dark is on every hand disturbance.

Indeed, I have tried carefully to study the methods by which the state is so organized as to assure such a life as to make it possible to suggest that the form that it has taken and the direction will undergo no change. So far, the only evidence given has been that based on differentiation of function. I have shown, as I think, that there is another of greater importance; the separation and the balance of powers is fundamental. It has been used with patient ingenuity, progressively to secure civil liberty by centralizing opposing forces. It is in this fashion that sovereignty has been progressively separated from private property: that in sovereignty itself we have seen a gradual separation between religious and material power, as also from civil power, in order that the latter may not too greatly

oppress sovereignty as a whole. In the same way, civil power itself has undergone constitutional separation into different powers for the purpose of reciprocal moderation. All these separations, of course, go only to a certain point. They neutralize antagonistic forces; they do not destroy them.

The organization of the state proceeds by different phases, of which the most interesting is administrative organization where centralization predominates over decentralization. All that proceeds, combined as it is with the theories of the corporate institution and the separation and balance of powers, leads to a theory of national sovereignty which, as I think, accurately resumes the facts. I have maintained in addition to the classic separation of governmental powers defined by Montesquieu a separation of the forms of sovereignty. Practically speaking, sovereignty has three forms which, in the play of the constitution, combine. We have sovereignty of statute, sovereignty of government, and the individual sovereignty of each subject.

The sovereignty of the constitutional condition is an idea familiar to American lawyers, and it is to American law that I owe the idea. However, I explain it differently. The American sovereignty is explained by delegation; it is that portion of the sovereignty which the nation reserved when it delegated power to government. I have no liking for the theory of delegation in that it is a fiction and leads to a denial that governmental power is original. The government takes its power from its own centralizing strength; the national corporation, in so far as it is decentralized, draws its own strength from the groups of which it is composed. It is this decentralized force we find behind the constitution. What is of interest is the fact that this explanation enables the recognition that judicial authority is an organ of the constitutional sovereign and not of the governmental sovereign, because it represents the decentralization of the social régime. In this way the power of the courts to declare statutes unconstitutional may be explained.

The sovereignty of government is the governmental power organized in a representative form. It may be divided into three parts — executive, legislative, and elective; but their analysis would lead me farther than I can here go.

Finally, the idea of sovereignty retained by the individual provides room for the two essential elements of a constitutional régime,

individual liberty and the element of publicity. The contribution made by the form of sovereignty to the common labor of the state is the spontaneous collaboration for the public good of individuals and of individual enterprises. Without that collaboration the life of the modern state would be impossible.

The bond between these three forms of sovereignty is found in the person of the head of the state. It demands for him a strong power. Such is the juristic structure, in all its complexity, of modern law. I am more happy to submit it to American lawyers, because more than one part of its teaching is derived from their own constructive effort.

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